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IN THE

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OF THE

United States

OCTOBER TERM, 1969

No. 963

DISTRICT COUNSEL OF PAINTERS NO. 16 OF ALAMEDA, MARIN, CONTRA COSTA, NAPA, SOLANO, YOLO, PLACER, SACRAMENTO, NEVADA, EL DORADO and SIERRA COUNTIES,
Petitioner,

—AGAINST—

PAINTERS UNION LOCAL 127, PAINTERS UNION LOCAL 560, PAINTERS UNION LOCAL 1178, SAM CAPONIO, WALLACE ROOD, DALE BALL, JAMES L. BROWN, TED CARTY, LEE LOPEZ and MORRIS KOMIE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DISTRICT COUNSEL OF PAINTERS NO. 16 OF ALAMEDA, MARIN, CONTRA COSTA, NAPA, SOLANO, YOLO, PLACER, SACRAMENTO, NEVADA, EL DORADO and SIERRA COUNTIES,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The District Counsel of Painters, No. 16 of Alameda, Marin, Contra Costa, Napa, Solano, Yolo, Placer, Sacramento, Nevada, El Dorado and Sierra Counties, an unincorporated association, petitioner, prays that a Writ of Certiorari issue to review the

judgment and order of the United States Court of Appeals for the Ninth Circuit affirming a judgment in favor of the Respondents entered on August 27, 1969.

OPINIONS BELOW

The United States District Court for the Northern District of California entered judgment for Respondent on Respondent's complaint for an injunction. The opinion of Judge Zirpoli is dated January 23, 1968 (Appendix "A" infra) and judgment was entered thereon in the office of the Clerk of the United States District Court for the Northern District of California on the 13th day of February, 1968 (278 F. Supp. 830).

On August 27, 1969 the United States Court of Appeals affirmed the judgment of the United States District Court (__F. 2d__) (Appendix "B" infra).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254. The jurisdiction of the lower Court was based upon 28 U. S. C. 1291. The jurisdiction of the District Court was based on 29 U.S.C. 411 and 412.

QUESTION PRESENTED

Whether a bylaw which provides for an automatic dues increase when wages are increased is violative of Section 3(i) of the Labor Management Reporting and Disclosure Act of 1959.

STATUTES INVOLVED

Section 3(i) of the Labor Management Reporting and Disclosure Act of 1959 (29 U. S. C. §411(a)(3)) (Appendix "C" infra).

STATEMENT OF THE CASE

The Respondents are three (3) local house painter unions of some eight (8) local house painter unions who together with five (5) autonomous painter unions are affiliated with the Petitioner. The petitioner is affiliated with and operates under the charter from the Brotherhood of Painters, Decorators and Paper Hangers of America AFL-CIO and has a territorial jurisdiction which covers the counties of Alameda, Marin, Contra Costa, Napa, Solano, Yolo, Placer, Sacramento, Nevada, El Dorado and Sierra in the State of California.

Article VI section 6(d) of the Petitioners By-Laws, enacted in 1956, provided as follows:

> "(d) The regular monthly dues for journeymen house painters, beneficial members, shall be increased in addition to the amount now being paid by the sum of money equal to the raise negotiated for one day (7 hours) and such additional payment of dues shall commence with the next effective annual date of the contract and continue for each succeeding twelve month period. Such increase would be leveled off at the nearest 25 cent divisible period. As a result of any dues

increase to become effective, 50% shall go to the LU and 50% shall go to the DC as increased special per capita tax."

Since 1962, Article VI, section 6(d) of said By-Laws has provided as follows:

> "(d) The regular monthly dues for journeymen house painters, beneficial members, shall be increased in addition to the amount now being paid by the sum of money equal to the raise negotiated for one day (7 hours) and such additional payment of dues shall commence with the next effective annual date of the contract and continue for each succeeding twelve month period. Such increase would be leveled off at the nearest 25 cent divisible period. As a result of any dues increase the delegates to the District Council shall determine by vote what proportion will go to the District Council. In the event the delegates of the District Council deem it feasible to the best interests of the District Council, the Local Unions and the Membership, the delegates may at any regular meeting declare a waiver on all or part of a dues raise by a majority vote."

Although the hourly wage of journeyman painters (pursuant to the terms of Collective Bargaining Agreements periodically negotiated with the employers in the territory covered by Petitioner) increased each year since 1957 the actual dues imposed upon members were increased but four different times including the raise in 1966 which is the subject of the within action.

Effective as of July 1, 1965, pursuant to the terms of the Collective Bargaining Agreement negotiated at or about that time with employers in the Northern California Area, a wage increase equivalent to fifty cents per hour was negotiated.

Applying the formula as set forth in the By-Laws section described above, the Petitioner had the authority to increase journeyman dues by three dollars fifty cents per month. However, the delegates to the Petitioner increased the dues by one dollar seventy-five cents per month per member in 1966 out of which each local union was required to pay to the District Council the sum of ninety cents per month per member thus increasing the per capita tax from three dollars twenty-five cents per month to four dollars fifteen cents per month per member.

REASONS FOR GRANTING THE WRIT

The decision and opinions in this case are in conflict with the decision and opinions of the Court of Appeals for the Second Circuit in *Zentner* v. *Musicians* 237 Fed Supp. 457 (1965) affirmed 343 F. 2d 758 (1965) and *Schwartz* v. *Associated Musicians of Greater New York, Local 802*, 340 F. 2d 228 (1964) where the Court held that dues based on a percentage of wages is not violative of the Act.

The Court should also grant the Writ due to the fact that the reasoning of the District Court, with which the Circuit Court agreed, was erroneous in that it

applied the wrong formula. The by-law section specifically relates dues to the hourly wage and to no other factor.

Applying the proper formula to table 1 in the District Court's opinion, one finds that the wage in 1956 was three dollars twenty-seven cents per hour and the dues in that year were six dollars twenty-five cents per month or 190 per cent of wages for a single hour. In 1959, when the Act was enacted, applying the proper formula, monthly dues were 220 per cent of the wages for one hour. In 1966 when the increase complained of, in the instant matter, was put into effect, the hourly rate was five dollars fifty-seven cents and the dues were set at ten dollars sixty cents per month or, as in 1956 190 per cent of the wages for a single hour. Therefore, applying the proper formula, the "rate of dues" has not increased since the enactment of Section 3(i) of the Labor Management Reporting and Disclosure Act of 1959.

The Court should grant the Writ for the further reason that many International Unions, as well as numerous inferior labor bodies, relate dues to wages. The Airline Pilots Association, Glass and Ceramic Workers, Glass Cutters, Glassworkers, Flint, Packinghouse Workers, Writer's Guild, East, and Writer's Guild, West, all relate their dues to wages.

Unless a decision is rendered defining the phrase "rate of dues" as used by the Act, these International

bodies, the inferior bodies associated with them, and other inferior bodies affiliated with other International Labor Organizations will find themselves in a dilemna with regard to either their dues or their per capita tax structures.

Finally, the rate of dues was set prior to the effective date of the Act and there was no legal requirement that the rate be re-established after 1959.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOSEPH E. SMITH
Attorney for Petitioners

PROOF OF SERVICE

I, Joseph E. Smith, Attorney for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on Francis J. McTernan, Attorney for Respondents, by mailing said copies via First Class Mail, postage prepaid, addressed to his office at 341 Market Street, San Francisco, California 94105.

Dated this 25th day of November, 1969.

JOSEPH E. SMITH

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAINTERS UNION LOCAL NO. 127, et al., *Plaintiffs*, vs. DISTRICT COUNCIL OF PAINTERS, NO. 16, et al., *Defendants*.	No. 45284
TED CARTY, et al., *Plaintiffs*, vs. DISTRICT COUNCIL OF PAINTERS, NO. 16, etc., et al., *Defendants*.	No. 45283 (Consolidated Cases)

Filed: January 24, 1968, James P. Welsh, Clerk

MEMORANDUM OPINION AND ORDER ENJOINING COLLECTION OF DUES

Plaintiffs—local unions and union members—seek to enjoin the defendants from enforcing certain dues increases approved by the District Council of Painters No. 16 in 1966. Plaintiffs assert that the increases are illegal because not consonant with 29 U.S.C. § 411(a)(3), in that the members did not approve the increases by secret ballot. The case was heard and

submitted on December 11, 1967. The court reopened the matter for further evidence at the court's request on December 28, 1967, as the parties had left certain matters untouched which the court felt might be relevant. The case was resubmitted on January 12, 1968. This memorandum opinion constitutes the court's findings of fact and conclusions of law.

FACTS

From 1956 to 1962, the District Council's By-Laws— Art. VI, § 6(d)—provided for an automatic increase[1] in dues[2] each time a raise was negotiated with employers. In 1962, § 6(d) was "changed"[3] to give the delegates to the District Council[4] the power to waive all or part of the increase otherwise required. Prior to the District Council's disputed action of 1966, each member paid dues to the local unions as indicated by Table 1 (below).

In 1966, the District Council increased the dues of members of locals from $8.85 to $10.60 per member per month. The threshold question is whether 29 U.S.C. § 411(a)(3) applies to the action at all.

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[1]The increase was equivalent to one day's increase in pay of seven hours. Exh. 2.

[2]From 1955 to 1960, members paid dues to their locals and a special assessment to the District Council. After July 1, 1960, members paid a combined amount to their locals which in turn paid the assessment (or per capita tax) to the District Council. At oral argument on November 22, 1967, counsel for defendants abandoned his earlier-alleged distinction between a tax paid by the local to the Council and dues paid by a member to his local. See *Local No. 2 . . .*, v. *International Brotherhood of Telephone Workers*, 362 F. 2d 891, 894-95 (1st Cir. 1966).

[3]Whether the "change" was an "amendment" of part of § 6(d) or a "readoption" of the entire provision is of some importance and is discussed below.

[4]Each local sent delegates to the District Council.

SECTION 411

Proscribed by 29 U.S.C. § 411(a)(3)[5] are increases in the "rates of dues" unless certain procedural steps are performed. § 411(a)(3)(A), (B). Defendants contend at the outset that *rates* of dues were not increased but that only *amounts* were increased. Legislative history sheds little light on what, if any, distinction Congress meant by use of the word "rates," instead of word "amount." There are cases which imply that dues fixed as a constant percentage of wages are lawful. *E.g.*, *Schwartz* v. *Associated Musicians of Greater New York* . . ., 340 F. 2d 228 (2d Cir. 1964); *Zentner* v. *American Federation of Musicians* . . ., 237 F. Supp. 457 (S.D. N.Y. 1965). If the 1966 action of the District Council did not increase the "rates of dues . . . in effect on September 14, 1959," § 411 is inapplicable and the injunction must be de-

[5]Section 411(a)(3) provides as follows:

Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by laws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

nied. Based on the evidence before it, the court has prepared the following schedule (Table I):

TABLE I

Year	Hourly[6] Wage ($)	Average[8] Hours Worked Per Year	Average Annual Earnings ($)	Average Monthly Earnings ($)	Dues Per Member Per Month ($)	Dues As Percent of Earnings
1957	3.27	1,617	5,278	440	6.25	1.42
1958	3.42	1,721	5,886	490	7.25	1.47
1959	3.57[7]	1,621	5,987	499	7.85	1.57
1960	3.77	1,594	6,009	501	8.85	1.77
1961	4.02	1,515	6,090	508	8.85	1.74
1962	4.27	1,448	6,183	515	8.85	1.72
1963	4.52	1,411	6,374	531	8.85	1.67
1964	4.77	1,394	6,425	535	8.85	1.65
1965	5.12	1,290	6,605	550	8.85	1.60
1966	5.57	1,290[9]	7,200	603	10.60	1.74

Five different criteria for determining whether there has been an increase in the "rates of dues" have at least implicitly been advanced during the course of these proceedings: First, compare the challenged (1966) rate with the (1959) rate in effect on September 14, 1959; Second, compare the challenged (1966)

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[6]Exh. 10 (submitted by plaintiffs); Exh. 12 (submitted by defendants. In trial briefs, the parties disputed whether direct employer contributions to health and welfare plans were includable in the hourly wage figure. The court need not resolve this dispute for the following reasons: (1) when the case was reopened on January 12, 1968, plaintiffs and defendants stipulated that Exhs. 10 and 12 accurately represented the figures that each relied upon; (2) it matters not which computation is used, for the court has computed the comparable percentages using the inflated wage figures (which include direct employer contributions to health and welfare plans) and finds that the rate of dues would be 1.64% for 1966 and 1.52% for 1959.

[7]The rate in effect on the date September 14, 1959, Exh. 13.

[8]Exh. 10.

[9]The reasonable finding most favorable for defendants. Any lower figure (supported by the trend over the years) would result in a higher percentage representing the rate of dues.

rate with the immediately prior (1965) effective rate; Third, compare the actual amounts in 1966 and 1959; Fourth, compare the actual amounts in 1966 and 1965; Fifth, determine whether the challenged rate had been provided for prior to September 14, 1959 (or after that date if in accordance with the provisions of § 411(a)(3)). To illustrate this last criterion, assume that in 1958, a union determined that from 1958 to 1965, dues should be 1 per cent, and that from 1966-1970, dues should be 2 per cent. Using the fifth criterion, one would say, in effect, that since the 2 per cent rate had already been predetermined and fixed in 1958, that the 1966 rate of 2 per cent was already "in effect" (for purposes of § 411) in 1959.

This court rejects the fifth criterion as inconsistent with the clear language and intent of § 411. The provision seeks to protect members against increases in rates of dues without procedural safeguards. The statute does not authorize increases pursuant to rate schedules (as it were) in effect in 1959. Congress intended that if a greater percentage (and possibly amount) of a member's wages was to be taken from him after 1959 than before, the procedural safeguards of § 411(a)(3) had to be observed to guarantee that the members genuinely desired such a result. Compare *Brooks* v. *Local No. 30* . . ., 187 F. Supp. 365 (E.D. Pa. 1960).

Even if the court were to adopt the fifth criterion, the court would conclude that the 1966 rate in the case

at bar would not be validated because the precise rate was unknown and unscheduled as of 1959. Raises negotiated and hours worked were unpredictable and both would affect the rate of dues.

Turning to the first four criteria, a cursory examination of Table I verifies that each criterion dictates the conclusion that the "rates of dues" were increased by the action of the District Council in 1966. Therefore, the court concludes that unless 29 U.S.C. § 411 (a)(3) was complied with, the increases were illegal and may be enjoined. This conclusion brings the court to a consideration of the 1962 change in the Council's By-Laws.

1962 CHANGE IN § 6(d)

Art. VI, § 6(d) of the District Council's By-Laws was changed in 1962. Below is § 6(d), 1962 deletions being lined out and additions being italicized:

> (d) The regular monthly dues for journeymen house painters, beneficial members, shall be increased in addition to the amount now being paid by the sum of money equal to the raise negotiated for one day (7 hours) . . . As a result of any dues increase ~~to become effective, 50% shall go to the LU and 50% shall go to the DC as increased special per capita tax.~~ *the delegates to the District Council shall determine by vote what proportion will remain in the Local Union and what proportion will go to the District Coun-*

cil. . . . [T]he delegates may . . . declare a waiver on all or part of a dues raise by a majority vote.

The 1962 change was effected by a vote of the members. All parties and the court take the following view of the signficance of the 1962 vote: If the 1962 vote was an "amendment", being a vote on whether there should be a power to waive the automatic increase (that would otherwise result) conferred upon the Council delegates, then the 1966 increase is not pursuant to a valid clause increasing the rates of dues of members. The reason would be that the automatic increase provision stems from 1956 and was never validated by a post-Landrum-Griffin vote (assuming for the moment that such a vote would have validated § 6(d), *cf.*, *Brooks* v. *Local No. 30* . . ., 187 F. Supp. 365 (E.D. Pa. 1960)) in compliance with § 411(a)(3). If, on the other hand, the 1962 vote was a "readoption" of the rate increase provision, then (if the 1962 vote complied with the requirements of § 411(a)(3)) the 1966 action may be lawful as pursuant to a provision enacted in compliance with § 411. *But see Brooks* v. *Local No. 30* . . ., 187 F. Supp. 365, 368 (E.D. Pa. 1960): "Congress clearly did not contemplate that a vote to increase the dues could be held and the union put it in effect at any time they wanted in the future. . . ." To be able to find a readoption, the members would have to have been given the choice to vote to retain or discontinue the automatic increase provision, and not only to decide whether to grant the Council to power to waive it.

From the oral testimony presented on December 11, 1967, and from the notices sent announcing the 1962 vote (Exhs. 3 and 4), this court interprets the evidence to dictate a finding that the vote was merely an amendment to § 6(d) and that the members did not have the opportunity or think they had the opportunity to discontinue or disapprove the automatic increase provision of § 6(d).

Because neither the 1962 vote not the 1966 Council's action complied with 28 U.S.C. § 411(a)(3),[10] and for the reasons and based on the findings herein, the court concludes that the dues increases in 1966 were unlawful, Therefore,

IT IS ORDERED that defendants and each of them, be and are permanently enjoined and restrained from taking any action, or discipline any plaintiff herein for failure to pay, the increased dues purportedly imposed in the 1966 action of the District Council.

Plaintiffs shall prepare and submit an appropriate form of judgment.

Dated: January 23, 1968.

ALFONSO J. ZIRPOLI

United States District Judge

[10] See parties' Agreed Statement, pp. 5-6, filed November 20, 1967.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAINTERS UNION LOCAL NO. 127, et al., *Plaintiffs*, vs. DISTRICT COUNCIL OF PAINTERS, NO. 16, et al., *Defendants*.	No. 45284
TED CARTY, et al., *Plaintiffs*, vs. DISTRICT COUNCIL OF PAINTERS, NO. 16, et al., *Defendants*.	No. 45283 (Consolidated Cases)

JUDGMENT AND DECREE

This action came on for trial before the court, Honorable Alfonso J. Zirpoli, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that

1. Defendant DISTRICT COUNCIL OF PAINTERS, NO. 16, its officers, agents and representatives, and all other defendants herein, and each of them, be and they are hereby permanently enjoined and restrained from taking any action to collect or to discipline any plaintiff herein for failure to pay any increased dues purportedly imposed by the action of

defendant DISTRICT COUNCIL OF PAINTERS, NO. 16, on January 20, 1966; and said defendants, and each of them, be and they are hereby further permanently enjoined and restrained from taking any action to collect, or to discipline any plaintiff herein for failure to pay, any increased special per capita tax purportedly imposed by the action of defendant DISTRICT COUNCIL OF PAINTERS, NO. 16, on April 7, 1966.

2. The increase in monthly dues purportedly imposed by defendant DISTRICT COUNCIL OF PAINTERS, NO. 16, upon the individual plaintiffs herein on January 20, 1966, and the increase in monthly special per capita tax purportedly imposed upon plaintiffs PAINTERS UNION LOCAL NO. 127, PAINTERS UNION NO. 1178 on April 7, 1966, are, and each of them, is void and of no effect.

3. Plaintiffs are entitled to recover their costs of suit.

Dated at San Francisco, California, this 12th day of February, 1968.

ALFONSO J. ZIRPOLI
United States District Judge

Approved as to form:

PHILLIP J. SMITH
SMITH, PARRISH, PADUCK & CLANCY

Attorneys for defendants

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DISTRICT COUNCIL OF PAINTERS, NO. 16 OF ALAMEDA, MARIN, CONTRA COSTA, NAPA, SOLANO, YOLO, PLACER, SACRAMENTO, NEVADA, EL DORADO and SIERRA COUNTIES, *Defendants-Appellants,* **VS.** PAINTERS UNION LOCAL 127, PAINTERS UNION 560(PAINTERS UNION LOCAL 1178, SAM CAPONIO, WALLACE ROOD, DALE BALL, JAMES L. BROWN, TED CARTY, LEE LOPEZ and MORRIS KOMIE, *Plaintiffs-Appellees.*	**No. 22,742**

(August 27, 1969)

On Appeal from the United States District Court for the Northern District of California.

Before: BARNES and MERRILL, Circuit Judges, KILKENNY, District Judge.

PER CURIAM:

Appellees seek to enjoin appellants from collecting a dues increase imposed by the appellants in 1966. The District Court granted the injunction and this appeal followed.

The District Court held the dues increase to be in violation of §3(i) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411 (a)(3).[1] The question presented on this appeal is whether the 1966 increase amounted to an increase in the rate of dues over that payable by appellees on the effective date of the Act.

The opinion of the District Court appears at 278 Fed. Supp. 830 (N.D.Cal. 1968). We agree with the District Court for the reasons there set forth that the 1966 dues increase did not comply with § 3(i) of the Act.

Judgment affirmed.

MERRILL, C. J., Concurring:

I agree with the result but for somewhat different reasons.

At the date of the Act appellant's By-Laws (enacted in 1956), Art. VI § 6(d) provided for a rate of dues as follows: to a fixed sum was to be added "The sum of money equal to the raise negotiated for one day (7 hours)". This to me is a perfectly valid "rate of dues". The amount of dues may as easily and precisely be calculated as by any percentage rate. The 1966 dues increase was in accordance with this rate.

The trouble, in my view, is that this rate was no longer in effect in 1966, Art. VI § 6(d) was amended in 1962 to provide in part:

> "In the event the delegates of the District Council deem it feasible to the best interests of the District Council, the Local Unions and the Membership, the delegates may at any regular meeting declare a waiver on all or part of a dues raise by a majority vote."

Pursuant to this amendment the Council, after 1962, imposed no dues increase until 1966, despite the fact that wage increases had regularly been secured through collective bargaining.

While on its face the 1962 amendment would appear to be nothing more than a benevolent reservation of the right to remit dues increases in whole or in part, in operation it is demonstrated to be far more.

Faced with the fact that with the passage of time the 1956 rate had become unnecessarily high, the proper course in 1962 would have been to reduce the rate. Instead of doing so the amendment in effect repealed the rate and substituted for it a power in the Council to increase dues in any amount it might choose below a stated maximum. Such a method of providing for dues increases constitutes a rate-fixing authority clearly contrary to the Act.

It follows that any increase in amount of dues imposed pursuant to the 1962 amendment must fall.

APPENDIX C

[1]29 U.S.C. §411(a)(3) provides as follows:

". . . (3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except. . . .

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constitutent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

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DISTRICT COUNCIL OF PAINTERS No. 16 of ALAMEDA, MARIN, CONTRA COSTA, NAPA, SOLANO, YOLO, PLACER, SACRAMENTO, NEVADA, EL DORADO and SIERRA COUNTIES,

Petitioners,

vs.

PAINTERS UNION LOCAL 127, PAINTERS UNION LOCAL 560, PAINTERS UNION LOCAL 1178, SAM CAPONIO, JAMES L. BROWN, TED CARTY, LEE LOPEZ and MORRIS KOURIE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 963

DISTRICT COUNCIL OF PAINTERS No. 16 of ALAMEDA, MARIN, CONTRA COSTA, NAPA, SOLANO, YOLO, PLACER, SACRAMENTO, NEVADA, EL DORADO and SIERRA COUNTIES,

Petitioners,

vs.

PAINTERS UNION LOCAL 127, PAINTERS UNION LOCAL 560, PAINTERS UNION LOCAL 1178, SAM CAPONIO, JAMES L. BROWN, TED CARTY, LEE LOPEZ and MORRIS KOURIE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondents in Opposition

OPINIONS BELOW

The opinion of the District Court (App. A of Petition) is reported at 278 Fed.Supp. 830 (R. 40-48) The opinion of the Court of Appeals for the Ninth Circuit and the concurring opinion (App. B of Petition) are reported at 415 Fed. 2d 1121.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, although it should be noted that no petition for rehearing or for hearing *en banc* was presented to the Court of Appeals.

QUESTIONS PRESENTED

Whether a by-law which vests in delegates to a labor council the right to increase dues of members of the local unions affiliated thereto in any amount below a stated maximum, is violative of section 101(a)(3) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC 401(a)(3)).

STATUTE INVOLVED

The pertinent sections of the Labor Management Reporting and Disclosure Act of 1959, to wit, section 101(a)(3)(A) and (B) (29 USC § 411(a)(3)(A) and (B)) are not fully set forth in the Petition. They are set forth in Appendix A of the Brief in Opposition.

STATEMENT[1]

The Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, is an international labor organization, within the meaning of section 3(i) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC § 402(i))[2] (R. 30) The Brotherhood is governed

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1. The statement of the case is based primarily upon the Agreed Statement of the parties in the District Court. (R. 30-37) As will be pointed out, *infra*, some evidence on which the District Court acted is not in the record before this court, nor before the Court of Appeal.

2. This Act is generally referred to as the Landrum Griffin Act and will be, at times, so referred to in this brief.

by its International officers and a so-called General Executive Board, which handle the affairs of the Brotherhood between conventions of the International, which are held every five years. (Exh. 1; R. 30) The Brotherhood has chartered local unions throughout the United States and Canada. Among them are Local 127, of Oakland, California, Local 560, of Richmond, California, Local 1178, of Hayward, California, and Local 487, of Sacramento, California, all but the latter of which are parties plaintiff to this action.

The Brotherhood also charters District Councils. District Councils are composed of local labor organizations, which operate within the territorial jurisdiction of the District Council. Defendant District Council No. 16, in this case, is chartered by the Brotherhood and has a territorial jurisdiction which covers the Counties of Alameda, Marin, Contra Costa, Napa, Solano, Yolo, Placer, Sacramento, Nevada, El Dorado and Sierra of the State of California. (R. 31)

Under the Constitution of the Brotherhood (Exh. 1; R. 30), all local unions within the territorial jurisdiction of the District Council must be affiliated therewith. (R. 32) Thus, Locals 127, 560, 487 and 1178, which are the local unions involved in this litigation, are affiliated with District Council No. 16.

Under the Constitution of the Brotherhood and the Bylaws of District Council No. 16 (Exh. 2; R. 31), a distinction is made between types of local unions affiliated therewith. Thus, local unions consisting of housepainters have a different status with the District Council than local unions consisting of persons engaged in trades other than housepainting. In the parlance of the Brotherhood, the former are referred to as housepainter local unions and the latter

are referred to as autonomous local unions. Local 487 and plaintiff Locals 127, 560 and 1178 are housepainter local unions.

Each local union affiliated with District Council No. 16 is entitled to send five delegates to the District Council, regardless of the number of members in the local. (R. 32-33) Thus, a local with 1,000 members has the same representation on the District Council as a local having 100 members.

The dues payable by members of housepainter locals to the local union are fixed in the By-laws of the District Council. Thus, under the current By-laws, regular monthly dues payable to the housepainter locals by each of its members were fixed in 1959 at $8.85 per month. (Exh. 2, Article VI, § 6(a))

Ever since 1956, Article VI, § 6(d) of the By-laws have provided that the regular monthly dues for housepainters would be automatically increased by the sum of money equal to the wage increase negotiated for seven hours' work and that such additional payment of dues would commence on the next effective annual date of the contract following the negotiation of the wage increase. (R. 33) In 1962, an amendment to the By-laws gave the delegates to the District Council authority to determine what portion of the increase would remain with the local union, and what portion would go to the District Council, *and to determine whether to waive a part or all of the automatic increase.* (R. 33)[3]

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3. The text of the By-law, as amended, appears in the Petition at p. 4. Its text, showing the old and new language, appears in the opinion of the District Court. (278 Fed.Supp., at pp. 833-34; App. A, Pet., pp. 14-15)

The Landrum Griffin Act provides that subsequent to its effective date, (September 14, 1959), rates of dues, except in the case of federations of national or international labor organizations, may not be increased except as provided in said Act.

Thus, in the case of local labor organizations, dues increases can be accomplished only by "(i) a majority vote by secret ballot of the members in good standing voting at a general or special membership meeting after reasonable notice of the intention to vote upon such questions, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot." (29 USC § 411 (a) (3) (A))

In the case of District Council No. 16, which is a labor organization other than a local labor organization or a federation of national or international labor organizations, dues increases can be accomplished only "(i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by laws of such labor organization: *Provided,* that such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization." (29 USC § 411 (a) (3) (B))

The By-laws of District Council No. 16 do not provide for a convention, regular or special, nor do they give the executive board authority, express or implied, to increase dues. (See Exh. 2)

Effective as of July 1, 1965, Local Unions 127, 478, 560 and 1178, together with other housepainter local unions within District Council No. 16, and elsewhere in the San Francisco Bay Area, negotiated a wage increase equal to 50¢ per hour, or $3.50 per day for a seven-hour day. (R. 34) In January, 1966, delegates to District Council No. 16 voted to apply Article VI, § 6 (d) of the By-laws to increase the rate of dues, and by a vote of 18 to 16, purported to increase the dues of the 4000 painters (R. 32) belonging to its affiliated locals by $1.75 per month to a new rate of $10.60 per month, per member. (R. 34; Exh. 5)

Pursuant to Article VI, § 5 of the By-laws, all housepainter local unions are required to pay a special per capita tax to the District Council for a special fund, at the rate of $3.25 per member, per month. (R. 34) In April, 1966, the delegates to the District Council, applying Article VI, § 6 (d) of the By-laws, purported to increase the special per capita tax by 90¢ per member, per month, to a new rate of $4.15 per member, per month. (R. 34; Exh. 6)

The net effect upon the union member was that he would be required to pay to the local union additional dues at the rate of $1.75 per month, or total dues at the new rate of $10.60 per month, of which $4.15 instead of the previous $3.25, would go to the District Council.

Before instituting this action in the District Court, plaintiffs had exhausted all hearing procedures provided them in the Constitution of the Brotherhood and the By-laws of District Council No. 16 with reference to any grievance or complaint they had with respect to the action of District Council No. 16 (R. 37)

There were two cases in the District Court. In one, the plaintiffs were individual members of Painter Union, Local 487 (R. 1-2) In the other, the plaintiffs in the Amended Complaint were three local unions (No. 127, No. 560 and No. 1178) and certain individual members of these locals. (R. 77-78) The cases were consolidated for trial and an appeal.

There were four causes of action stated in the Amended Complaint. The first sought to enjoin the District Council from enforcing the dues increase of 1.75 per month, per member, upon the ground that the increase was imposed in violation of 29 USC § 411 (a) (3) (A); the second sought to enjoin the District Council from enforcing the increase in the special per capita tax upon the ground that the increase was imposed in violation of 29 USC § 411 (a) (3) (B); the third sought a declaratory judgment, declaring that both increases are illegal and void; and the fourth invoked the pendant jurisdiction of the court to enjoin enforcement of both increases upon the ground that they were imposed in violation of the plain requirements of the By-laws of the District Council and the Constitution of the international brotherhood.

The District Court granted the injunction and declaratory relief sought in the first three causes of action. (R. 49-50) The opinion of the District Court constituted its findings of fact and conclusions of law. (278 Fed.Supp. 830, 831; App.A, Pet. p. 10)

The majority of the Court of Appeals adopted the District Court's opinion as its own and affirmed the judgment below. Judge Merrill of the Court of Appeals concurred in a separate opinion, setting forth a different ground in support of the judgment of the District Court.

ARGUMENT

There are several reasons why this case is not an appropriate one for the granting of a writ of certiorari.

1. Petitioner has not furnished this court with a proper record on which it can act. Althuogh the "Designation of the Record on Appeal" included a "Reporter's Transcript" (R. 33), petitioner did not make any provision for the preparation and filing of such transcript in the Court of Appeals. The Agreed Statement did not contain all the evidence before the District Court, as is apparent from its opinion. The District Court referred to and relied on many exhibits (278 Fed.Supp. 830, 832-34; Pet.App.A, pp. 12, 16), as well as testimony (278 Fed.Supp. 830, 834; Pet. App.A, p. 16) which do not appear in the record.

Missing particularly from the record are the testimony and exhibits relied on by the District Court in findings concerning the critical change in the District Council By-laws in 1962. All parties agreed in the District Court that if the "1962 vote was an 'amendment,' being a vote on whether there should be a power to waive the automatic increase (that would otherwise result) conferred upon the Council delegates, then the 1966 increase is not pursuant to a valid clause increasing the rates of dues of members." (278 Fed.Sup. 830, at p. 834; Pet.App.A., p. 16)

In finding that the vote was, indeed, an "amendment" conferring such power, the court relied on testimony and exhibits which are not in the record before this court. If the testimony and other evidence support the District Court's findings (and there is no claim that they do not), then Petitioner's concession as stated by the District Court would end this case. But Petitioner has not presented, either to this court or the Court of Appeals, any record

to show that it did not make the concession attributed to it by the District Court or that the District Court's finding was not based upon substantial evidence.[4]

For the court to grant certiorari in this case, in view of the foregoing, would be to forget the teachings of *Conway v. California Adult Authority*, ... U.S. .....; 90 Sup.Ct. 312, (October Term, 1969, No. 40) so recently decided.

2. The decision below is not in conflict with the decision of the Court of Appeals for the Second Circuit in *Schwartz v. Associated Musicians of Greater N.Y.*, 340 Fed.2d 228 (1964), as claimed by Petitioner. In the first place, that court did not hold, as Petitioner asserts (Pet. p. 5), that a dues structure basing dues on a percentage of wages conforms to the Act. That issue was not raised. The holding on that aspect of the case was that the plaintiffs in that particular case did not have a right to vote on that dues structure. By failing to question the dues structure, the court may have impliedly approved it. Certainly, however, there is no holding to that effect.

Moreover, the dues structure in the *Musicians* case determined dues by a fixed percentage of earnings. As the District Court demonstrated in this case, there is no fixed percentage determining dues. (278 Fed.Supp. 830, 832; Pet. App.A, p. 12) The factors that determine dues in this case are many, one being the illegal power granted to the delegates to the District Council to increase dues in any amount below a stated maximum. Such a method is clearly different from the method impliedly approved in the *Musicians* case; and it constitutes "a rate fixing authority clearly contrary to the Act." (See Judge Merrill concurring

4. It might also be inferred that lack of a proper record was what motivated the Court of Appeal to follow the unusual course of adopting the District Court's opinion as its own.

in the court below, 415 Fed. 2d at p. 1122; Pet.App.B, p. 21)

Finally, the District Court correctly cited *Schwartz* v. *Associated Musicians, etc., supra,* favorably as a case which *implies* that dues fixed as a constant percentage of wages are lawful. (278 Fed.Supp. 830, 832; Pet. App. A, p. 11)

3. Petitioner claims that the decision below jeopardizes dues structures of many unions which allegedly relate their dues to wages. But the vice of the dues structure in this case is not that dues relate to wages, but that dues can be changed without the procedural protection required by the Landrum Griffin Act. Neither court below suggested that tying dues to wages is, *per se,* a violation of the Act. In fact, as pointed out, *supra,* the District Court opinion cited the *Musicians* cases with approval as cases which "imply that dues fixed as a constant percentage of wages are lawful." (See 278 Fed.Supp. 830, 831; Pet. App.A, p. 11)

Moreover, there is no evidence in this record to indicate how the unions mentioned by Petitioner, in fact, fix their dues (Pet. p. 6) and thus no basis for speculation as to any "dilemma" the decision below poses for them, as conjured up by Petitioner. (Pet. p. 7)

4. Petitioner also claims that the decision below is incorrect because the rate of dues was set before the effective date of the Act. This contention is in patent disregard of the record. As pointed out, *supra,* the critical findings of the District Court invalidating the 1966 increase are based upon evidence of an amendment to the By-laws in 1962 three years after the effective date of the Act.

5. Petitioner's assertion that "the By-law section (in question) specifically relates dues to the hourly wage and to no other factor" (Pet. p. 6) is patently in error. True, by its terms the By-law relates dues increases to hourly

increases in wages. But Petitioner omits the critical additional feature of the By-law that delegates to the Council can determine the increase at any figure within that maximum. It is that power (in this case exercised by 34 men, voting 18 to 16) to determine the increase in dues of 4,000 union members that is fatal to Petitioner's case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS J. MCTERNAN

Counsel for Respondents.

PROOF OF SERVICE

I, FRANCIS J. MCTERNAN, Attorney for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Brief For Respondents in Opposition on Joseph E. Smith, Attorney for Petitioners, by mailing said copies via First Class Mail, postage paid, addressed to his office at 405-14th Street, Oakland, California 94612.

Dated this 19th day of February, 1970.

FRANCIS J. MCTERNAN

(Appendix A Follows)

Appendix A

Section 101(a)(3) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC § 401(a)(3) provides as follows:

"(3) *Dues, initiation fees, and assessments.*—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

> "(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or
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> "(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."